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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

AMERICA'S CHOICE, INC., et al., Plaintiffs and Appellants, v. THOMAS EDWARD McGRATH, Defendant and Respondent.	D053209 (Super. Ct. No. 37-2007-00067322-CU-CO-CTL)

APPEAL from an order of the Superior Court of San Diego County, Yuri Hofmann, Judge. Reversed.

In this case the trial court did not have jurisdiction to relieve the defendant of his default and default judgment under either Code of Civil Procedure[1] section 473 or section 473.5.

1 All statutory references are to the Code of Civil Procedure unless otherwise specified.

The defendant did not move for relief within six months after the default was entered. Thus the court had no power under section 473 to provide relief from the default or default judgment. The alternative provisions of section 473.5 permit relief more than six months after entry of a default where a defendant has no actual notice of a pending action. However, under section 473.5, in addition to demonstrating he did not have actual knowledge of a pending action, a defendant must also establish his lack of notice was not the result of any attempt to avoid service. Here, the defendant did not offer any evidence with respect to whether his failure to receive actual notice of the plaintiff's action was caused by an attempt to avoid service. Indeed, evidence offered by the plaintiff suggests the defendant was attempting to avoid service at the time service was made on him. Thus, notwithstanding evidence the defendant did not have actual notice of the plaintiff's action complaint, the record is not sufficient to permit relief under the alternative provisions of section 473.5. Thus the trial court erred in granting the defendant relief under sections 473 and 473.5 and its order must be reversed.

Although nonstatutory relief would be available to the defendant if he were able to show that the default or the default judgment were entered as the result of extrinsic fraud, the trial court made no finding on this issue. Our review of the record shows that the defendant did not meet his burden with respect to nonstatutory relief.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs and appellants America's Choice, Inc., and A ASAP Overhead Doors, Inc. (collectively America's Choice), are in the garage door business. Defendant and respondent Thomas Edward McGrath was a management level employee of America's

Choice who has claimed an interest in America's Choice. In 2007 a dispute between America's Choice and McGrath arose and America's Choice filed a complaint against McGrath which alleged causes of action for declaratory relief, cancellation of corporate share certificates, and possession of corporate books, records and property.

After America's Choice had made a number of unsuccessful attempts to serve McGrath, at 6:30 a.m. on May 31, 2007, a private investigator personally served a person he believed was McGrath at McGrath's last known address with a summons and America's Choice's complaint. Although shortly after America's Choice served the complaint McGrath retained counsel for the purpose of asserting his rights against America's Choice, his counsel was not informed about America's Choice's complaint and no timely response to the complaint was filed. On July 3, 2007, America's Choice served McGrath by mail with a copy of a request for entry of default. McGrath's default was entered on the same day.

Eric Hart, the attorney McGrath had retained to assert his claims against America's Choice, lost contact with McGrath in July or August 2007. On September 25, 2007, McGrath was incarcerated pending a criminal trial. After McGrath was served by mail with a request for entry of a judgment and a proposed default judgment, and after the trial court conducted a prove-up hearing, on December 12, 2007, the trial court entered a default judgment in favor of America's Choice. The judgment determined that McGrath had no interest in America's Choice, canceled certain shares of the corporation, and required that McGrath return certain corporate documents to America's Choice.

On January 30, 2008, Michael McGrath, McGrath's brother, received from an attorney, who was working with him and his mother on another matter, copies of all the documents which had been filed in the America's Choice action. There is no explanation in the record of how the attorneys discovered America's Choice's action and judgment. In any event, Michael McGrath immediately took those documents to Eric Hart.

On February 14, 2008, McGrath, who was still incarcerated, filed a motion for relief from the default and default judgment. McGrath argued the summons and complaint were never served, that in any event the default and default judgment were entered through mistake, inadvertence, surprise, or excusable neglect, and that America's Choice had presented false testimony at the prove-up hearing. McGrath asked for relief under section 473 and in the alternative for equitable relief from the default and default judgment. In support of his motion, McGrath submitted a declaration in which he stated, in pertinent part: "3. Until approximately one week ago, I had no knowledge of this lawsuit, that I had been defaulted, or that a judgment from this lawsuit had been entered. [¶] 4. Today was the first time that I have had an opportunity to review the Complaint in this action, and I have no recollection of ever being served personally or by mail with this document nor any other document related to this case." McGrath's motion was also supported by a declaration from Hart, in which he declared he had been retained by McGrath in June 2007, that he lost contact with McGrath in the summer of 2007, and that he had no knowledge of America Choice's lawsuit until it was brought to his attention by McGrath's brother.

America's Choice opposed McGrath's motion. America's Choice argued McGrath had been served, that the time for relief under section 473 had expired, and that any testimony it provided at the prove-up hearing was not extrinsic fraud which would support equitable relief from the judgment. In support of its position, America's Choice submitted the declaration of the investigator who served McGrath at his last known address. The investigator stated he had kept McGrath under surveillance for a number of days, that he staked out the home which was McGrath's last known address and waited for a woman he believed was McGrath's girlfriend to leave the residence briefly, and that before she returned he knocked on the door and a man fitting McGrath's description answered the door. According to the investigator, he handed the man the summons and complaint.

After America's Choice's opposition was filed, McGrath did not present any evidence which refuted the investigator's declaration. McGrath did submit a declaration which attempted to establish that he had an ownership interest in America's Choice.

The trial court granted McGrath's motion for relief. The trial court found that McGrath did not have actual notice of the lawsuit and that his lack of actual notice entitled him to relief under sections 473 and 473.5. America's Choice filed a timely notice of appeal.

DISCUSSION

I

Section 473, subdivision (b), permits a court to relieve a litigant "from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake,

inadvertence, surprise, or excusable neglect. Application for this relief . . . *shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.*" (Italics added.) The time limits imposed by section 473 apply to claims that service was not made when, as is the case here, those claims are based on post-judgment declarations of the defendant rather than defects which appear on the face of the judgment or judgment roll. (See *City of Los Angeles v. Morgan* (1951) 105 Cal.App.2d 726, 730.)[2]

Under section 473, "the entry of the default fixes the beginning of the period within which the motion to set aside the default judgment must be made, since the default as well as the judgment based on it must be set aside if effective relief is to be had." (40A Cal.Jur.3d (2006) Judgments, § 267, pp. 406-407, fn. omitted; *Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d 965, 970; *Koski v. U-Haul Co.* (1963) 212 Cal.App.2d 640, 642-643.) Thus, even if a defendant moves for relief within six months after a *default judgment* has been entered, if the motion is made more than six months after the underlying *default* was entered, it is too late. (*Koski v. U-Haul, supra*, 212 Cal.App.2d at pp. 642-643; *Monica v. Oliveira* (1956) 147 Cal.App.2d 275, 276.)

Contrary to McGrath's argument, this case does not represent any exception from the general rule. As in other cases, relief from the default judgment by itself would not

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2 The parties dispute whether the trial court found that McGrath had not been served and whether there is evidence to support such a finding. We need not reach these contentions, because even if we resolve them in McGrath's favor, his motion was untimely under section 473 and as we explain, he was not entitled to relief under section 473.5 or to equitable relief from the default.

be effective. As the court in *Rutan v. Summit Sports, Inc.*, noted, relieving a litigant from a default judgment would be an idle act because without relief from the underlying default, the plaintiff could simply reapply for entry of a judgment and receive a judgment providing it with the relief alleged in its complaint. (*Rutan v. Summitt Sports, Inc., supra,* 173 Cal.App.3d at p. 970.) Although McGrath believes documents in his possession would prevent America's Choice from establishing its case at any new prove-up hearing, he substantially overstates the nature of a plaintiff's burden at a prove-up hearing. At a prove-up hearing a plaintiff only needs to establish a prima facie basis for its claims, which America's Choice did at the 2007 prove-up hearing. (*Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361-362.) At the 2007 prove-up hearing, America's Choice did not have to rebut any conflicting evidence which McGrath may have had in his possession and it would not have to do so in any further prove-up hearing. (*Ibid*.) Thus the documents upon which McGrath relies, while they might support a defense had the case been tried on the merits, would not prevent immediate re-entry of judgment in America's Choice's favor if the underlying default is not vacated.

Here, McGrath's motion was made more than six months after the default was entered. Hence the trial court had no jurisdiction to provide relief under section 473.

II

Although not requested by McGrath in the trial court, the trial court found McGrath was entitled to the alternative relief provided by section 473.5. Under section 473.5:

"(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him or her; or (ii) 180 days after service on him or her of a written notice that the default or default judgment has been entered.

"(b) A notice of motion to set aside a default or default judgment and for leave to defend the action shall designate as the time for making the motion a date prescribed by subdivision (b) of Section 1005, and it shall be accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect. The party shall serve and file with the notice a copy of the answer, motion, or other pleading proposed to be filed in the action.

"(c) Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that his or her lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action."

Although McGrath's motion was not made under section 473.5, because McGrath's motion was filed within six months after McGrath was served with written notice of entry of the default and default judgment, arguably it was timely under the

provisions of section 473.5. However, even if we were willing to extend the provisions of section 473.5 to a litigant who did not ask for it, section 473.5 would not be available here. McGrath did not submit a declaration or affidavit in which he stated his failure to have actual notice was not the result of his avoidance of service of process and the trial court made no finding on the issue. (See *Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1319.) The need for such a declaration was particularly acute here in light of the declaration of America's Choice's investigator in which he described the extraordinary measures he took in serving McGrath. In this context, and contrary to McGrath's argument on appeal, his statement that he has no memory of being served did not offer any implied statement that he did not avoid service. Our unwillingness to uphold the trial court's section 473.5 ruling is buttressed by the fact that in the absence of a request for relief under section 473.5 from McGrath, America's Choice did not have an opportunity to fully dispute McGrath's right to relief under the statute and in particular an opportunity to present evidence which would corroborate its investigator's statement as to the extraordinary efforts America's Choice employed in serving McGrath and evidence of any steps he took to avoid service.

In sum, given the absence of evidence that McGrath was not avoiding service and any finding on the issue, relief under section 473.5 was not available.

III

As we have previously noted, in addition to seeking relief under section 473, McGrath also argued America's Choice had presented false testimony at the prove-up hearing. The trial court made no ruling on this contention. On appeal McGrath

nonetheless suggests the alleged false testimony and the fact he did not have actual notice of the lawsuit provides alternative equitable grounds upon which we should affirm the judgment. We decline to do so.

Courts have inherent equitable power to set aside a judgment based on extrinsic fraud or mistake even after the six-month jurisdictional period of section 473 has passed. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981; *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 260.) When as is the case here, a default judgment has been entered, "equitable relief may be given only in exceptional circumstances." (*Rappleyea v. Campbell, supra,* 8 Cal.4th at p. 981.) The defendant's failure to respond must be due to some excusable circumstance which prevented the defendant from either knowing about the lawsuit or responding to it. (*Sporn v. Home Depot USA, Inc.* (2005) 126 Cal.App.4th 1294, 1300.) Here, there is evidence in the record McGrath was avoiding service of process and undisputed evidence that following service of process America's Choice repeatedly served McGrath with documents which reflected the default it had taken. This record will not support exceptional equitable relief because it suggests McGrath's failure to receive actual notice of the lawsuit was in substantial measure McGrath's fault rather than the result of some excusable circumstance.

DISPOSITION

Relief under sections 473 and 473.5 was not available and the record will not support equitable relief from the judgment.

The order relieving McGrath of the default and default judgment is reversed. America's Choice to recover its costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

McDONALD, J.